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No. 00-42

FILED

AUG - 4 2000

CLERK

IN THE

Supreme Court of the United States

L.R.S.C. CO.,

Petitioner,

v.

RICKEL HOME CENTERS, INC. and STAPLES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Third Circuit Properly Dismissed Petitioner's Appeal as Moot Pursuant to 11 U.S.C. § 363(m).

STATEMENT PURSUANT TO RULE 29.6

Staples, Inc. is a publicly-traded corporation with no parent company and no one publicly-held company owning more than 10% of its outstanding stock. However, affiliates of Janus Equity Funds and Fidelity Investments, in various mutual funds, do own in the aggregate approximately 10% or more of the outstanding stock of Staples, Inc.

Rickel Home Centers, Inc. is a Debtor in Chapter 11 bankruptcy proceedings and it has no parent company. Its stock is not publicly traded.

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Rule:

Fed. R. Civ. P. 62(d) 3

Respondents request that the Court deny the petition for certiorari seeking review of a judgment of the United States Court of Appeals for the Third Circuit for the reasons set forth below.

STATEMENT OF THE CASE

A. Procedural History

Petitioner seeks review of the April 6, 2000 Judgment of the United States Court of Appeals for the Third Circuit (Petition at App. 1) affirming the March 6, 1998 order of the United States District Court for the District of Delaware (Petition at App. 3). In its March 6, 1998 order, the District Court allowed a motion by the Debtor Rickel Home Centers, Inc. ("Rickel" or "Debtor") to assume (where applicable) and sell and assign its interest in 41 non-residential real property leases to Respondent Staples, Inc. ("Staples") pursuant to §§ 363 and 365 of the Bankruptcy Code (11 U.S.C. § 101, *et seq.*), including a lease of real property located in Lawrenceville, New Jersey (which lease is the subject of Petitioner's appeal). *Id.* Rickel had previously assumed the Lawrenceville lease with the approval of the United States Bankruptcy Court for the District of Delaware in early 1997. *See In re Rickel Home Ctrs., Inc.*, 209 F.3d 291, 294 (3d Cir. 2000); Petition at App. 26.

The District Court heard this matter after reassignment of the case from the Bankruptcy Court. Hearings were held on three separate dates, at which times the parties submitted proffers of evidence. Petition at App. 4. In its March 6, 1998 decision and order, the District Court refused to enforce a use restriction contained in Article 10 of the lease at issue here, which limited the use of the premises to its operation

as a Channel Home Center (a defunct retail home-improvement store). Petition at App. 16 and 27-30. In addition, the District Court interpreted the assignment provisions contained in Article 15A of the Lawrenceville lease to allow assignment by Rickel to Staples without the consent of Petitioner as landlord. Petition at App. 41. The District Court approved the Debtor's sale and assignment of the lease and further ordered that Staples and its nominee would be entitled to the protections afforded in Section 363(m) of the Bankruptcy Code. Petition at App. 6. The District Court retained jurisdiction to construe and determine disputes under its order. Petition at App. 18.

B. Statement of Facts

The opinion of the Court of Appeals can be found at 209 F.3d 291 and it correctly sets forth the facts in detail in this case. Petitioners' statement of facts (much of which is not relevant to a determination of whether certiorari should be granted) misstates certain facts and omits several other material facts.

Of central concern is the Petitioner's characterization of Staples' bid as an "all or nothing" proposition. While Staples did bid $35.5 million for a package which comprised the Debtor's interest in 41 leaseholds, one of those leaseholds was subject to a landlord's right of first refusal. The landlord on that lease exercised its right of first refusal and the District Court approved its exercise, thereby removing one of the subject leases from the package with a corresponding reduction in the purchase price. *See* Petition at App. 7 (Order at ¶ O). It was clear, therefore, to all interested parties in the proceedings (including Petitioner) that Staples' bid was not all or nothing.

Of course, Petitioner posits Staples' offer as "all or nothing" to set up its argument that a bond of $35.5 million would have been required to preserve its appellate rights. Nevertheless, Petitioner never asked the District Court to set a lesser bond for its appeal with respect to the Lawrenceville lease in accordance with Fed. R. Civ. P. 62(d). In fact, Petitioner never sought any stay at all or otherwise made any effort to have the District Court calculate a suitable bond to obtain a stay.

REASONS FOR DENYING THE WRIT

A. The Supreme Court Need Not Reconsider the Court of Appeals' Decision

There being no conflict on the points raised in the Petition in and among the circuit courts of appeals, as Petitioner acknowledges (Petition at 4), there is no reason for the Supreme Court to grant Petitioner's petition for certiorari. Moreover, Petitioner does not suggest that the Court of Appeals' decision conflicts with any Supreme Court precedent, nor does it suggest that the issues in this Petition are of national importance. Similarly, Petitioner cites no issue of pressing public policy. Rather, the issues in this Petition are confined to the facts of this case. What Petitioner did was fail to seek a stay of the District Court's order, despite the District Court's specific invocation of § 363(m) in its order, and as a result, the Court of Appeals found Petitioner's appeal moot. There is absolutely no reason for this Court to reconsider that determination.

B. Debtor's Leasehold Interest At Issue Was Property of The Estate Subject to Sale and Assignment

Petitioner acknowledges that Debtor was lessee under a written lease for 38,000 square feet of commercial space in a shopping center located in Lawrenceville, New Jersey. Exercising its rights under §§ 363 and 365 of the Bankruptcy Code, and having previously assumed the lease, Debtor moved for authority to sell and assign its leasehold interest to Staples, and Debtor sought relief from various restrictions in the lease in connection with that sale.

Faced with a determination by both the District Court and Court of Appeals that the Bankruptcy Code's statutory mootness provisions contained in § 363(m) apply to the sale transaction between Rickel and Staples, Petitioner takes a new tack in raising an argument not previously made below. Petitioner contends that "if subsection 365(b)(3) conditions are not met, the Debtor has no property interest in the lease to assign." Petition at 4. What Petitioner describes as the "subsection 365(b)(3) conditions" are provisions of the Bankruptcy Code defining the term "adequate assurance of future performance" for purposes of assumption and assignment of a lease in a shopping center. *See* §§ 365(b)(1) and (f)(2)(B) of the Bankruptcy Code. The Debtor's showing of such "adequate assurance" is a condition to assumption and assignment of an executory lease. Petitioner is arguing for the first time here that the conditions to assignment somehow strip the estate of property rights it has as of the commencement of the case.[1]

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1. Previously, as the Court of Appeals noted, Petitioner argued that the District Court erred in characterizing the transaction as a "sale." *See* 209 F.3d at 302. Petitioner did not challenge the fact that Debtor's leasehold interest is a property interest under New Jersey law or dispute that that interest is "property of the estate." *Id.* at 302 n.12.

A novel argument, Petitioner's contentions are without basis in the law.

It is axiomatic that the Debtor's interest in an executory lease constitutes "property of the estate" subject to sale under § 363 of the Bankruptcy Code. Property of the estate is defined to include, among other things, "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). The cases confirming this point in the context of an executory contract or unexpired lease are legion. *See, e.g., In re Taylor*, 913 F.2d 102, 106 (3d Cir. 1990) (property rights arising under executory contract and accruing prepetition are property of the estate even if contract has not yet been assumed); *In re Arizona Appetito's Stores, Inc.*, 893 F.2d 216, 218 (9th Cir. 1990) (leasehold interest arising under unexpired lease is property of the estate); *In re 48th St. Steakhouse, Inc.*, 835 F.2d 427, 430 (2d Cir. 1987), *cert. denied*, 485 U.S. 1035 (1988) (unexpired leasehold interests are property of the estate); *In re Lovitt*, 757 F.2d 1035, 1040 (9th Cir.), *cert. denied*, 474 U.S. 849 (1985) (leasehold interest arising under unexpired lease becomes property of the estate upon assumption). *Compare United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203-04 (1983) (scope of property of the bankruptcy estate which may be used, sold or leased under § 363 is broadly construed).

The question here is not whether the Debtor had a property interest in the lease subject to sale and assignment (which it clearly did), but rather whether the Petitioner properly preserved its appellate rights to challenge the District Court's reasons for allowing the sale and assignment of Debtor's leasehold interest. As discussed below, in failing to seek a stay, Petitioner simply did not preserve its rights to challenge the District Court's order.

C. Petitioner Failed to Seek a Stay and its Appeal Was Moot Under § 363(m) of the Bankruptcy Code

The Third Circuit Court of Appeals properly recognized a lease assignment as the mechanism of implementing the sale of a leasehold interest and found nothing incongruous in the District Court's order authorizing both the sale and assignment of the Debtor's interest. Finding "statutory mootness" pursuant to § 363(m) of the Bankruptcy Code applicable to the sale transaction here, the Third Circuit brought itself into line with the other courts of appeals which have considered the issue. *See, e.g., In re Adamson Co.*, 159 F.3d 896 (4th Cir. 1998); *In re Exennium, Inc.*, 715 F.2d 1401 (9th Cir. 1983). *See also In re Stadium Management Corp.*, 895 F.2d 845 (1st Cir. 1990).

The Court of Appeals noted in its decision that, "[t]hese cases reflect the policies of section 363(m) 'not only [to afford] finality to the judgment of the bankruptcy court, but particularly to give finality to those orders and judgments upon which third parties rely' " (citing *In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143, 147 (3d Cir. 1986)). 209 F.3d at 303-04. The Court stated that "[t]he strength of these policies is reflected in numerous other decisions of the courts of appeals rejecting as moot an appeal from an order authorizing a sale of estate property under section 363 when the transaction has been completed." *Id.* at 304 [citations omitted].

The Court of Appeals found perplexing "LRSC's failure even to request a stay," even one limited to the Lawrenceville lease at issue in its appeal, and concluded that "[Petitioner] did nothing other than appeal and failed to take steps that might have minimized the dislocation a reversal of the

assignment would cause the parties at this time." *Id.* at 305. Under the circumstances of this case, having agreed with the District Court concerning the applicability of § 363(m) to the sale, the Court of Appeals correctly analyzed the impact of a reversal of the District Court's order upon the transaction. Inasmuch as reversal or modification would have adversely affected the validity of the transaction between Rickel and Staples, the Court of Appeals found Petitioner's appeal moot. Petitioner cites no real reason why this Court should reconsider that determination.

D. The Court of Appeals Properly Distinguished Its Prior Decision *In re Joshua Slocum*

Seeking to create a controversy where none exists, Petitioner suggests that the Third Circuit Court of Appeals' decision at issue here conflicts with an earlier decision of the Court of Appeals, *In re Joshua Slocum, Ltd.*, 922 F.2d 1081 (3d Cir. 1990). Notwithstanding Petitioner's contentions, the Court of Appeals did correctly distinguish the circumstances of this case from the facts in *Slocum*.[2] 209 F.3d at 302. In fact, the Third Circuit had previously explained in *Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc.*, 141 F.3d 490 (3d Cir. 1998) that assignments of executory contracts under § 365 could also be sales subject to § 363. The Court of Appeals stated in this case: "Here, we are faced with the precise facts that *Krebs* noted were significant by their absence in *Slocum*." 209 F.3d at 302. In this case, unlike in *Slocum*, the Debtor specifically sought to sell the lease and the District Court explicitly authorized a sale under § 363, as well as an assignment under § 365. *Id.* In *Slocum*, the facts were just the opposite.

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2. Even if there were such a conflict, the proper way to address the conflict would have been by a petition for rehearing *en banc* in the Court of Appeals.

What Petitioner apparently finds objectionable is the application of § 363 to the Debtor's sale to Staples. Nevertheless, faced with the District Court's decision that § 363(m) applied, it was incumbent upon Petitioner to seek a stay in order to preserve its appellate rights. Having failed to do so, its appeal was moot and its Petition must be denied.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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